

Examination of the need for preliminary examinations

By LYND E. POWELL

VIEWPOINT

There is currently a movement afoot to do away with preliminary examinations in the majority of felony cases (except when desired by only the prosecutor) in the hope that it will reduce jail overcrowding while also more readily freeing law enforcement officers to return to their primary public safety duties — thereby purportedly resulting in a more cost effective criminal justice system.

The purpose of this article is to attempt to examine objectively whether this is so, or whether this proposal may be an illusion that, ironically, could have the very opposite effect while also raising serious constitutional issues of due process and equal protection. It also incorporates, condenses and acknowledges input received from members of the criminal defense bar primarily by means of the forum of the State Appellate Defenders Office (SAIDO) as well as from members of the law enforcement profession.

Primary nature & purpose of preliminary examinations

A preliminary examination is the first substantive hearing in district court before a judge in felony cases during which the state is required to produce sufficient evidence to establish that there is probable cause to believe that a crime has been committed and that the defendant committed it.

- In the pursuit of justice, other important purposes for the state and the defense at preliminary examinations are:
 - the determination of whether there is sufficient probable cause to hold a respondent for trial;
 - the amount of bond the defendant will receive if held for trial;
 - the receipt of information about witnesses and evidence (i.e., discovery);
 - the weeding out of groundless or unsupported charges;
 - the preservation of testimony in the event that a witness disappears or dies before trial; and
 - the relief of the accused from the degradation and expense of a criminal trial while also preventing any unnecessary deprivation of liberty.
- This is also in accord with the due process and equal protection clauses of the Fourteenth Amendment, as well as the provisions of the Fifth, Sixth, and Eighth Amendments of the Bill of Rights. In that light, it provides the opportunity for an immediate development of evidence and testimony essential to the ends of justice.

Cost effectiveness of preliminary examinations

In addition to being essential toward the ends of justice, preliminary examinations also serve as a valuable screening process that enables an early resolution of many cases.

Expedited resolutions at the preliminary examination stage protect the resources of the community in many ways.

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sumption of innocence, to spend more time in jails, along with a substantial increase in costs.

The best solution

Doing away with preliminary examinations would exacerbate, rather than resolve, the legitimate problems raised by some in the law enforcement component of the criminal justice system. A better solution is to overcome those problems by improving upon our existing preliminary examination system as follows:

- Hold mandatory pre-exam conferences (well before scheduled preliminary exam-

Preliminary examinations preserve judicial resources by avoiding additional expensive bond reduction and arraignment hearings. They avoid jury trials in circuit courts, free jurors and witnesses from having to take time off from work and their families, and they also free law enforcement officers from lengthy waiting to give testimony in circuit court.

Early resolution of cases at the front end of the process saves community resources by avoiding overloading of circuit court cases at the back end of the process.

Categorization of lesser felonies can be misleading

The rationale that "lesser felonies" need not have preliminary exams is misleading as the maximum statutory penalty is determined by an individual's criminal history.

For example, under habitual offender enhancements, a defendant with three prior non-violent felony convictions, no matter how old or remote in time, may receive a possible life sentence if convicted of a new felony with a statutory maximum of five years.

This underscores the perils of such arbitrary categorizations that could result in the loss of the critically important judicial review of "lesser felonies" at the preliminary examination stage, where consequences for individual defendants can differ markedly and be much more serious.

Important gatekeeper role of the judicial process

The judges who preside over preliminary examinations are the gatekeepers to the criminal justice system. One of the important benefits to preliminary examinations is that they serve to weed out cases that are without merit or overcharged.

The current system has a built-in check-and-balance process that benefits everyone — witnesses, prosecutors, victims, law enforcement, and the accused. Cases without merit are dismissed. Those with merit are allowed to proceed, which allows an early opportunity for a resolution that is fair and satisfactory to all involved in the case.

Enhancement of the opportunity for meaningful bonds

Bond review is another example of how the preliminary examination process improves the criminal justice system and is more cost effective. Preliminary examinations give the court the opportunity to evaluate bond. At the time of the preliminary examination, the court has all of the relevant parties present to review the bond — the prosecutor, defense counsel, the alleged victim, the defendant, and any witness to the crime.

The preliminary examination is the first opportunity for additional information about the defendant, as well as circumstances of the alleged crime to be

heard, giving the judge the opportunity to set an accurate bond, thus eliminating the additional expenditure of a separate bond motion.

The reality is that bonds are frequently reduced at the preliminary examination stage to either a lower cash bond or to a personal recognizance bond which allows for the conditional release of the defendant.

It is rare for a bond to be increased. However, even in those rare cases when a bond needs to be increased, the preliminary examination stage provides an effective forum for this contingency. In other words, both the prosecution and the defense enjoy a tangible benefit by virtue of this proceeding.

Eases jail overcrowding

The preliminary examination process helps to ease jail overcrowding, which is currently a major concern for Washtenaw County as well as other counties throughout the state. Scheduled preliminary examinations often reduce jail time for defendants by allowing deals to be made at that time. Preliminary examinations often act as an incentive to deal before either side takes the risk of making their case better or worse by holding a hearing.

Without preliminary examinations, pleas would be delayed and bond reductions would probably be less successful. This would increase rather than decrease the inmate population of the jail.

Loss of an opportunity for discovery

Without the right to take deposition testimony or to do discovery subpoenas, this would mean going to trial with virtually no discovery. No civil lawyer would ever be expected to go forward without such discovery, nor should any criminal law practitioner for either the state or the defense.

Actual innocence

It may be true that 75 percent of the exams are waived, but this ignores the 25 percent of the cases where preliminary examinations are needed to properly pre-

pare or position cases. Many of the 25 percent are innocent, or at least innocent of the actual charge.

In many cases, the preliminary examinations may be more important than the actual trial. The evidence may demonstrate that a defendant was overcharged and then the evidence for the proper charge emerges.

Conversely, the evidence may demonstrate the strength of the prosecution's case, allowing them to add or increase criminal charges. Defendants are far more likely to engage in plea or sentence bargaining in light of such evidence.

Moreover, of the 75 percent of preliminary examinations purportedly waived, it is estimated that the overwhelming majority of those are waivers for pleas that also make speedy, efficient and economical dispositions of cases that would otherwise end up in circuit court for a much more time consuming and expensive process that ties up law enforcement officers rather than to more readily free them to return to their regular public safety duties.

To the accused person who is innocent, there is no such thing as a "less serious" felony charge. Ironically, the proposal to do away with preliminary examinations for so-called lesser felonies would substantially increase the workload in circuit courts. Defendants have less incentive to agree to a plea without information about the witnesses and evidence that could be presented at the preliminary examination stage. In older cases, both prosecution and defense need to know if the witnesses are still available to provide the evidence needed for a conviction.

The consequence of doing away with preliminary examinations would be a significant increase in more expensive, time-consuming and resource-diverting circuit court trials that would tie up law enforcement officers rather than to more expeditiously free them to return to their public safety duties. This will cause more accused persons, who are entitled to a pre-

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- Police officers would only be on standby and called to the court if and when they are needed. Therefore, they would be free to continue providing safety and security to the community. It should be noted, that even under the current system, prosecutors often allow officers to be on standby with no objection by defense counsel.

• Prosecutors must be willing to make plea offers to defendants that are not conditioned on the appearance of witnesses at preliminary exams. Prosecutors are often disinclined to make any offers until they know which witnesses will appear and are able to assess the strengths or weaknesses of a case. This means that cases

cannot be resolved until the date and time of the preliminary exam. This is a policy shift that is fully within the current discretion of the prosecutor.

Therefore, in order to avoid serious constitutional questions of equal protection and due process, justice requires that all components of the criminal justice system work together to strengthen and improve upon our existing preliminary examination procedures. To do otherwise would only exacerbate the very problem that we seek to solve.

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